

FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20543 JUL -7 AM 9:00

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR 6838

DATE COMPLAINT FILED: June 5, 2014

DATE OF LAST RESPONSE: Not Applicable

DATE ACTIVATED: May 13, 2015

EXPIRATION OF SOL: May 28, 2019

ELECTION CYCLE: 2014

COMPLAINANT:

Robert R. Rush

RESPONDENT:

Unknown Respondent

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(22), (23)¹

52 U.S.C. § 30104(b), (g)

52 U.S.C. § 30120(a)

11 C.F.R. § 100.22

11 C.F.R. § 100.26

11 C.F.R. § 104.4

11 C.F.R. § 109.10

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges that a mailer distributed in Cedar Rapids, Iowa, that references three federal candidates "appear[s] to be a violation of federal law" because "the entity claiming to have sent the postcard is unregistered under either federal or state law."²

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act"), was transferred from Title 2 to new Title 52 of the United States Code.

² Compl. at 1.

16044402173

1 Based on the available information, this Office recommends that the Commission find reason
2 to believe that Unknown Respondent failed to include a proper disclaimer on the mailer; failed to
3 report expenditures or independent expenditures; and failed to file a 24-hour independent
4 expenditure notice.³ Furthermore, in support of our proposed investigation we recommend that the
5 Commission authorize compulsory process, as necessary.

6 II. FACTUAL BACKGROUND

7 The mailer at issue, enclosed with the Complaint, is a postcard, one side of which bears
8 photographs of two federal candidates and two state candidates, in progressively increasing size
9 from left to right in the following order: Bruce Braley, Jack Hatch, Andrea Jackson, and Anesa
10 Kajtazovic.⁴ The full name of each candidate is printed below the candidate's photograph. The
11 top of the mailer states, "Vote Tuesday June 3rd." Below the photographs, the mailer states,
12 "Vote for Representation that works for YOU!" The back of the mailer, to the left of the
13 addressee area, reads, "Pat Murphy," another federal candidate, with a large question mark
14 below this name, and below that, in smaller typeface, "After 22 years in the Iowa House[,] why
15 are our roads so bad?" Below this wording, in small typeface, the mailer contains the disclaimer,
16 "Paid for by Voters for Better Government." Finally, the mailer contains a bulk mail permit
17 imprint. The mailer contains no return address. According to the Complainant, he received the
18 mailer on May 28, 2014,⁵ six days before the Iowa primary election on June 3, 2014. The
19 Complainant identifies himself as a resident of Iowa's First Congressional District.

³ See 52 U.S.C. §§ 30104(b), 30104(c), 30104(g), and 30120(a).

⁴ Compl. at 3.

⁵ *Id.* at 2.

1 In June 2014, Bruce Braley, who was then serving as U.S. Representative for Iowa's First
2 Congressional District, was a candidate in the U.S. Senate Democratic primary election in Iowa;
3 Anesa Kajtazovic and Pat Murphy were both members of the Iowa House of Representatives and
4 candidates in the Democratic primary election for Braley's open seat in the U.S. House of
5 Representatives: Jack Hatch was a candidate for the Democratic nomination for Governor of
6 Iowa; and Andrea Jackson was a Democratic candidate for Linn County supervisor.⁶

7 Voters for Better Government, which purportedly paid for the mailer, is not registered as
8 a political committee with the Commission, and the Iowa Ethics and Campaign Disclosure Board
9 contains no accessible public record of this organization.⁷ We found no public record of an
10 entity named Voters for Better Government that is active in Iowa.⁸ Candidates Braley,
11 Kajtazovic, Hatch, and Jackson and their respective campaigns have reportedly denied any
12 knowledge of the source of the mailing and have denied any responsibility for the mailing.⁹
13 Because Voters for Better Government may be a fictitious organization, we are making
14 recommendations as to Unknown Respondent in this Report.

⁶ Murphy defeated Kajtazovic in the primary election on June 3, 2014.

⁷ See IOWA ETHICS AND CAMPAIGN DISCLOSURE BOARD, <https://webapp.iecdb.iowa.gov/publicview/NewContributionSearch.aspx> (last visited June 30, 2015).

⁸ An entity named Voters for Better Government, Inc., is registered in Georgia, and one named Voters for Better Government is registered in Texas. Neither appears to be currently active. The Georgia Secretary of State website indicates that Voters for Better Government, Inc. was incorporated in 1987 and is in automated administrative dissolution / revocation. See CORPORATIONS DIVISION, GEORGIA SECRETARY OF STATE, <https://cgov.sos.state.ga.us/Account.aspx/ViewEntityData?entityId=733124> (last visited June 30, 2015). Voters for Better Government in Texas filed General-Purpose Committee Campaign Finance Reports with the Texas Ethics Commission in 2004 and 2005; in these reports, it documented no contributions, expenditures, or measures or candidates that it supported or opposed. See TEXAS ETHICS COMMISSION, <https://www.ethics.state.tx.us/php/filer.php?acct=00054755GPAC> (last visited June 30, 2015). We found no record of subsequent activity for this organization.

⁹ See Rick Smith, *Campaign Postcard Leaves Endorsed Candidates Crying Foul*, GAZETTE (Cedar Rapids, Iowa), June 2, 2014, <http://thegazette.com/subject/news/politics/election/campaigns/campaign-postcard-leaves-endorsed-candidates-crying-foul-20140601>.

UNRECORDED

1 **III. LEGAL ANALYSIS**

2 **A. Failure to Include a Compliant Disclaimer**

3 The Act requires that all public communications that expressly advocate the election or
4 defeat of a clearly identified candidate include a disclaimer.¹⁰ A "public communication"
5 includes a "mass mailing," defined as a mailing of more than 500 pieces of mail matter of an
6 identical or substantially similar nature within any 30-day period.¹¹ The available information
7 suggests that the mailer here is a "public communication."¹²

8 It further appears that the mailer expressly advocates the election of clearly identified
9 federal candidates. A communication expressly advocates the election or defeat of a clearly
10 identified federal candidate if it uses "phrases" such as "Smith for Congress," "Bill McKay in
11 '94." or "vote Pro-Life" or "vote Pro-Choice" with a listing of clearly identified candidates
12 described as Pro-Life or Pro-Choice, among other enumerated examples, or "communications of
13 campaign slogan(s) or individual word(s), which in context can have no other reasonable
14 meaning than to urge the election or defeat of one or more clearly identified candidates such as
15 posters, bumper stickers, advertisements, etc., which say 'Nixon's the One,' 'Carter '76,'
16 'Reagan/Bush,' or 'Mondale!'"¹³ The Commission's regulations further provide that express

¹⁰ 52 U.S.C. § 30120(a); see 11 C.F.R. § 110.11(a)(2).

¹¹ 52 U.S.C. § 30101(22), (23); see 11 C.F.R. §§ 100.26, 100.27.

¹² At a minimum, at least 200 copies of the mailer were distributed because the bulk mail permit imprint reflects that the mailers were sent by Standard Mail. The U.S. Postal Service ("USPS") requires a minimum of 200 pieces or 50 pounds of mail to qualify for the Standard Mail bulk mail discount. See USPS, <http://pe.usps.com/businessmail101/getstarted/bulkmail.htm> (last visited June 30, 2015).

¹³ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as "Smith for Congress" and "Bill McKay in '94." have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. See *Express Advocacy: Independent Expenditures; Corporate and Labor Organization Expenditures*, 70 Fed. Reg. 35,292, 35,294-35,295 (July 6, 1995) (explanation and justification); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates).

16044400176

1 advocacy includes communications containing an "electoral portion" that is "unmistakable,
2 unambiguous, and suggestive of only one meaning" and about which "reasonable minds could
3 not differ as to whether it encourages actions to elect or defeat" a clearly identified candidate
4 when taken as a whole and with limited reference to external events, such as the proximity to the
5 election.¹⁴

6 In this case, the mailer clearly identifies federal candidates Braley and Kajtazovic by
7 featuring their photos and names above the words "Vote for Representation that works for
8 YOU!" This positioning of an exhortation to vote with photos of candidates is similar to the
9 content of the publication found to be express advocacy in *Massachusetts Citizens for Life, Inc.*
10 The publication at issue in that case contained the statement, "Vote Pro-Life" and featured the
11 photographs of thirteen candidates.¹⁵ Here, too, the mailing creates "an explicit directive: vote
12 for these (named) candidates,"¹⁶ by identifying and providing photographs of federal candidates
13 Braley and Kajtazovic with an explicit call to "Vote Tuesday June 3rd" and to "Vote for
14 Representation that works for YOU!" Accordingly, under either 11 C.F.R. § 100.22(a) or (b).
15 the mailer appears to constitute express advocacy. Thus, the mailer appears to require a
16 disclaimer.

17 Under the Act's disclaimer requirements, communications authorized and paid for by a
18 candidate, an authorized committee of a candidate, or an agent of either, must clearly state that
19 the communications were paid for by the authorized political committee.¹⁷ Communications

¹⁴ 11 C.F.R. § 100.22(b).

¹⁵ *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 233-34.

¹⁶ *Id.* at 249.

¹⁷ 52 U.S.C. § 30120(a)(1).

16044402177

1 authorized by a candidate, an authorized committee of a candidate, or an agent of either but paid
2 for by another person, must clearly state that the communications were paid for by such person
3 but authorized by the political committee.¹⁸ Finally, a communication not authorized by a
4 candidate, an authorized committee, or an agent of either, must clearly state the name and
5 permanent street address, telephone number, or World Wide Web address of the person who paid
6 for the communication and state that the communication was not authorized by any candidate or
7 candidate's committee.¹⁹

8 The disclaimer on the mailer expressly advocating the election of Braley and Kajtazovic
9 is not compliant with the requirements of the Act, as it states that the mailer was paid for by
10 Voters for Better Government but lacks a statement regarding whether it was authorized by a
11 candidate. Moreover, it appears that Voters for Better Government may be a fictitious
12 organization. If, in fact, Voters for Better Government does not exist as an entity, the partial
13 disclaimer stating that this entity paid for the mailer would be false. Therefore, we recommend
14 that the Commission find reason to believe that Unknown Respondent violated 52 U.S.C.
15 § 30120(a) by failing to include a fully compliant disclaimer on the mailer at issue in this matter.

16 **B. Failure to Report Expenditures/Independent Expenditures**

17 Regardless of who financed the mailers, the available information suggests that
18 expenditures for them should have been disclosed to the Commission. No person did so. If a
19 person other than a political committee made the expenditures and they exceeded \$250, the
20 person should have filed an independent expenditure report with the Commission pursuant to

¹⁸ *Id.* § 30120(a)(2).

¹⁹ *Id.* § 30120(a)(3).

180044444061

1 52 U.S.C. § 30104(c).²⁰ If either an authorized or unauthorized political committee made the
2 expenditures, the committee should have disclosed them in a regular disclosure report.²¹
3 Accordingly, we recommend that the Commission find reason to believe that Unknown
4 Respondent violated 52 U.S.C. § 30104(b) or (c) by failing to report expenditures made in
5 connection with the mailers.

6 In addition, because the mailer appears to have been distributed on May 28, 2014,²² days
7 before the June 3, 2014 primary election, it may have required disclosure by a 24-hour
8 independent expenditure notice if the amount expended exceeded \$1,000.²³ Accordingly, we
9 recommend that the Commission find reason to believe that Unknown Respondent violated
10 52 U.S.C. § 30104(g).

11 IV. PROPOSED DISCOVERY

12 We propose to conduct a limited investigation to identify the person or persons who paid
13 for and authorized the mailers, which may be performed through tracing the holder of the bulk
14 mail permit. We also seek to discover the cost of the mailers and determine the scope and dates
15 of the distribution of the mailers. Finally, we recommend that the Commission authorize the use
16 of compulsory process because formal discovery may be necessary to identify the holder of the
17 permit.

²⁰ The Act defines "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at the request or suggestion of such a candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." *Id.* § 30101(17).

²¹ *Id.* §§ 30104(b)(4)(G), 30104(b)(4)(H)(iii).

²² *See* Compl. at 2.

²³ *See* 52 U.S.C. § 30104(g)(1)(A) (requiring 24-hour notices for independent expenditures aggregating \$1,000 or more made after the 20th day, but more than 24 hours before, the date of an election). Political committees and other persons must file 24-hour notices by 11:59 p.m. on the day following the date on which the independent expenditure communication is publicly distributed. *See* 11 C.F.R. §§ 104.4(c), 109.10(d).

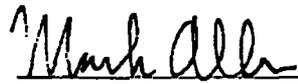
V. RECOMMENDATIONS

1. Find reason to believe that Unknown Respondent violated 52 U.S.C. §§ 30120(a), 30104(b) or (c), and 30104(g).
2. Authorize the use of compulsory process, as necessary.
3. Approve the attached Factual and Legal Analysis.²⁴
4. Approve the appropriate letters.

Date

July 6, 2015


Daniel A. Petalas
Associate General Counsel for Enforcement


Mark Allen
Assistant General Counsel


Tanya D. Senanayake
Attorney

²⁴ The Factual and Legal Analysis will be sent to the party responsible for the mailers once its identity is ascertained in the investigation.